

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GATEWAY DISTRIBUTION, INC.

and

Case No. 9-CA-34722

DOMINIC PANGALLO, AN INDIVIDUAL

Theresa Donnelly, Esq.,
of Cincinnati, Ohio,
for the General Counsel.
Mark Greenberger, Esq.,
of Cincinnati, Ohio,
for the Respondent.

DECISION

Statement of the Case

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Cincinnati, Ohio, on October 7, 1997. Subsequently, briefs were filed by the General Counsel and the Respondent. The proceeding is based on a charge filed March 20, 1997,¹ by Dominic Pangallo, an individual. The Regional Director's complaint dated June 24, alleges that Respondent Gateway Distribution, Inc., of Cincinnati, Ohio, violated Section 8(a)(1) of the National Labor Relations Act by discharging Dominic and Wanda Pangallo because of their protected concerted activities.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is engaged in the transportation and distribution of general commodities and it annually transports goods valued in excess of \$50,000 throughout the United States. It admits that at all times material is and has been an employer engaged in operation affecting commerce within the meaning of Sections 2(2)(6) and (7) of the Act.

¹ All following dates will be in 1997, unless otherwise indicated.

II. The Alleged Unfair Labor Practices

Respondent is engaged in the distribution and warehousing of various commodities. Kathy Carucci is the president, her husband Wayne Carucci is vice president of sales and operations, and Mike Moffo is the operations manager. Dominic and Wanda Pangallo were hired in May 1996 and were employed as an over-the-road husband and wife driving team, primarily transporting to freight West Coast states. These West Coast runs were the Respondent's principal long distance runs utilizing a team and a sleeper tractor unit and the preponderance of the Respondent's operations involved, shorter runs and smaller non sleeper tractor units. In January Wayne Carucci interview another highly recommended during team but did not hire them as his initial plans to buy a second sleeper tractor were not feasible.

Operations Manager Moffo testified that Dominic and Wanda complained to him about health insurance, pay sheets, their runs, layovers and the size of their tractor, "basically they complained about everything," and that he reported each of these complaints to Wayne Carucci. As a result of the complaint about the size of the sleeping quarters of the tractor, the Respondent authorized the Pangallos to sleep at motels. Both Kathy and Wayne Carucci acknowledged that in addition to reports from Moffo, that during the almost 9 months that the Pangallos worked for Gateway they complained directly about: health insurance coverage, conditions of equipment and detailed pay documentation as well as peculiarity of runs, layovers, size of the tractor. It appears that the Carucci's attempted to resolve the various complaints without apparent animosity and Dominic Pangallo testified that there was no question in his mind that he was paid for everything that he did for the Respondent and that Kathy and Wayne were good people and that he liked them. Otherwise, Wayne Carucci admitted that he grew aggravated with Dominic for coming to him with insurance questions because he had repeatedly told him to discuss the matter with Kathy because he did not handle the insurance. When the Pangallos learned on about January 15 that they were insured, Dominic stated his displeasure that he was not told sooner.

In late January the Pangallos had tire trouble in Arizona on their return from California. After initially questioning the asserted condition of the tire (they had been recently checked at a local service center) Wayne Carucci arranged for the purchase of a new tire at a location about 50 miles from where they had stopped. When the Pangallos' returned from their next trip in the late evening of February 9, after a 7-day run, Dominic found that his personal van wouldn't start so he took the company tractor home and called the Respondent the morning of February 10, spoke to Moffo about the location of the tractor and learned of a possible Florida run with a required Thursday morning delivery.

On February 11, Dominic and a friend, Lucian Adkins, went to Respondent's facility to borrow jumper cables to start the Pangallos' van. Wayne Carucci asked Dominic if he and Wanda could leave that night on the Florida run. Dominic said he protested, explaining that he and Wanda could make it to Florida in 14 or 16 hours so he preferred to leave the next day at about noon. Dominic then told Wayne that he and Wanda had received the insurance cards but they did not have any of the accompanying literature which explained the insurance and medical providers and he asked Wayne if he had this documentation. Pangallo testified that Wayne became upset and responded, "Don, I'm sick and fuckin tired of you and this insurance, you know, I don't handle it, Kathy does" and that after he told Wayne that Wanda had already called Kathy, "he told me not fuckin bother him about this insurance again. Pangallo then testified that Wayne said "something" like "I've got another team hired anyway. In answer to a question from the General Counsel, Pangallo stated that he made no response to the alleged comment about another team being hired. He asserted that he forgot about getting his

personal van because he was upset and just walked out and drove home in the company tractor.

Adkins testified that he overheard Carucci ask Pangallo to take a load out that evening and Pangallo said “no” that he didn’t want to, that he needed to get some rest, that he would leave at 5:00 a.m. in the morning. Adkins then testified that Carucci jumped out of his seat and got in Don’s face. . . it was big uproar. . . then he and Don were arguing about it. Don was so mad that he was walking out and “he told me he had been replaced and that he was fired.”

Pangallo testified that Carucci asked him if I had any problem with leaving tonight. And he said he could, if he had to, “but there was no reason to, because Wanda and I ran team.” Pangallo also testified that the next morning, at about 8:00 a.m. or 9:00 a.m., Wayne Carucci called him and asked if he was still quitting? He said he answered that he thought that it had been settled last night when Wayne told him that he hired another team and that Wayne gave no response. A few hours later Carucci and the new driver came to the Pangallos’ home to retrieve the tractor.

Wayne Carucci testified that he called Dominic at about 10:30 a.m. and that Dominic told him that he and Wanda were quitting and he then accepted their resignation.

III. Discussion

In proceedings involving termination of employment, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees’ protected concerted activities were a motivating factor in the employer’s decision to terminate or to discipline them. Here, the record shows Dominic Pangallo made numerous complaints about working conditions on behalf of himself and his wife (and co driver). The fact that they were married and, in effect, a single “team” does not make the actions any less concerted and I find that his actions were for their mutual aid and protection. See *Circle K Corporation*, 305 NLRB 932 (1991) enf. 989 F.2d 498 (1993), *Monongahela Power Company*, 314 NLRB 65 (1995), and *Compuware Corp.*, 320 NLRB No. 18 (1995).

The Respondent admittedly was annoyed by the repetitive nature of some of the Pangallos’ complaints and their alleged termination occurred shortly after Dominic made another insurance complaint to Wayne Carucci, after having been repeatedly told that Kathy Carucci was the one who handled such matters. The timing of the alleged termination, immediately after this latest complaint helps to show that the General Counsel has met the threshold requirements for showing protected concerted activity and motivation and, under these circumstances, I find that the General Counsel has met his initial burden by presenting a showing sufficient to support an inference that the employees’ concerted activities were a motivating factor in Respondent’s subsequent decision to terminate them. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent’s defense and whether the General Counsel has carried his overall burden.

As pointed out by the Court, in *Transportation Management Corp.*, *supra*.

an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

5 The Respondent's defense is dependent upon Wayne Carucci's description of the events that occurred on February 11 when Pangallo and Adkins went to get the Pangallos' van from the Respondent's facility and on February 12 when the Pangallos' failed to make a timely pick up of the loaded trailer destined for a February 13 delivery in Florida.

10 Carucci testified after he told Pangallo that it was important that the delivery he made at 8 o'clock sharp when an unloading crew would be available and that the customer be satisfied with the service. When Pangallo said they might leave late tonight or might leave late in the morning. Carucci said, "Don, you're cutting it close, leaving late tomorrow." He said, "Me and Wanda are a team, we'll make it." Carucci then repeated the importance of the timed delivery and Pangallo said "No problem." "I don't really want to leave tonight, but if not we'll leave very first thing in the morning, early morning" and then said something to the effect of, "What about this insurance?" Carucci said "Don, I've told you four times I don't handle insurance. See Kathy about insurance. I don't know anything about insurance" then Pangallo got a little huffy and he says "This is" — I don't know what he said, walking out the door, at the time, with his friend.

20 Carucci said he ran some errands on Wednesday morning came in about 10:00, and saw that the Florida trailer was still in Door 1. Carucci testified that he called Pangallo and said, "What are you" — "What's going on? It's ten o'clock, you're making me nervous. This shipment has to be in Southern Florida tomorrow morning at eight o'clock." His response was, "Well, Wayne, me and Wanda been talking. And we've decided we're not gonna run for you anymore." I said, "Don, what did you say?" He said it — repeated the same words. I said, "Don, I accept your quitting."

30 Carucci said that he hung the phone up and called another driving team that he had recently interviewed and they said they could be there in a few hours. He then learned that the Pangallos still had the company tractor and he and the new driver went to the Pangallos' address, found the tractor and Carucci got in the truck and started it up. Dominic came out and said "What's the trouble?" Carucci said, "Don, I told you this truck has to be in South Florida tomorrow. This man's taking it. I'm sorry that you feel this way. I don't want any hard feelings." He says, "I don't want any problems either." I said "There are no problems." He says, "I want a full paycheck." I said, "You're gonna get a full paycheck. You've always gotten a full paycheck. You can pick it up Friday."

40 Pangallo got some personal effects out of the tractor, and sometime after 5 p.m. the trailer was attached and left for Florida, however, the resulting delivery was made several hours late.

45 Here, I find that both Dominic Pangallo and his friend Adkins (who, in the past, had dated the Pangallos' daughter) gave rather inconsistent testimony about the events in the Respondent's facility on Tuesday, February 11 and there is little that persuade me that there is any corroborative, trustworthy testimony that Wayne Carucci told Dominic Pangallo that he was fired at that time. In this connection Pangallo did not testify that Carucci said he was fired but merely said "something" about another team being hired. Adkins initially said that Dominic told him that he was fired after he walked out but he also testified that Dominic walked out the door, that he didn't think Dominic even hear Carucci say he was fired and that they didn't discuss it

afterwards.

I also find Pangallo's action in taking the company tractor (and not his own van), home with him is inconsistent with any believe that he was fired or would not be returning the next morning to pick up the loaded trailer for the Florida run. I find it most likely that he did not consider himself to be fired and that he was still considering the option that he and Wanda would make the run the next day. Moreover, even if Carucci had mentioned the availability of another driving team, I find that, without more, this would not be the equivalent of "firing" the Pangallos.

The Pangallos otherwise make no attempt to make an early or mid morning picking to start their run and I find that this lend credence to Carucci's recollection of events. I find Carucci's demeanor to be believable and trustworthy and I find that his description of the events to be the most credible. Accordingly I find that when Carucci called after 10 am on Wednesday the 12th, Dominic told him that he and Wanda were not going to run for him anymore.

Under these circumstance, I conclude that the Pangallos voluntarily quit their employment and I find that the Respondent has persuasively shown that they were not terminated. Otherwise, the Respondent has shown that it had valid reasons for interviewing another driving team (prior to the Pangallos' most recent complaints), and that it had persuasive, legitimate concerns about successfully making a required timed delivery in Florida. Accordingly, I find that no violation of the Act occurred when the Respondent called another team to make the delivery and I conclude that the General Counsel has failed to prove that the Respondent violated Section 8(a)(1) of the Act in this respect, as alleged.

IV. Conclusions of Law

1. Respondent Gateway Distribution Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

ORDER²

The Complaint is dismissed in its entirety.

² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. December 11, 1997.

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Richard H. Beddow, Jr.
Administrative Law Judge

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